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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1092.

UNIVERSAL MARION CORPORATION,
Petitioner,

vs.

THE WARNER & SWASEY COMPANY, *et al.,*
Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari.

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Metallizing Engineering Co. v. Kenyon Bearing & A. P. Co., 153 F. 2d 516 (2nd Cir. 1946), did not effect an erosion of the doctrine of *Elizabeth v. Pavement Co.*, 97 U. S. 126 (1877), as contended by Petitioner on page 2 of the reply brief.

Elizabeth v. Pavement Co., supra, and this Court's decision in *Smith & Griggs Mfg. Co. v. Sprague,* 123 U. S. 249 (1887), clearly state that any use mainly for profit is not an experimental use. This is all that the *Metallizing* case decided in so far as the question of experimental use is concerned.

The District Court in the *Metallizing* case, 62 F. Supp. 42, 55-56, noted that incidental profit or benefit would not change the character of an experimental use. This is the holding of *Elizabeth v. Pavement Co.* The District Court, however, then found that the use by the patentee was mainly for profit thereby taking the use out of *Elizabeth v. Pavement Co., supra,* and into *Smith & Griggs Mfg. Co. v. Sprague, supra.*

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On appeal, Judge Learned Hand expressly approved these findings, 153 F. 2d 516, and then dealt with the patentee's contention that a use mainly for profit is not a public use provided the use is kept secret. It is in this reference that Judge Learned Hand spoke of competitive exploitation and not in the sense that incidental profit or benefit would, contrary to the doctrine of the *Elizabeth* case, destroy the character of a use which was otherwise experimental.

Respectfully submitted,

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